BEFORE THE LAND USE HEARINGS EXAMINER
FOR CLARK COUNTY, WASHINGTON

In the matter of a Type III rezone application from R-10 to R-5 for 36.5 acres in unincorporated Clark County, Washington.	**FINAL ORDER** **Krenzel Rezone** **CPZ2004-00004, SEP2004-00128**

I. Summary:

This Order is the decision of the Clark County Land Use Hearings Examiner denying this application for a rezone from R-10 to R-5 for 36.5 acres in unincorporated Clark County (CPZ2004-00004, SEP2004-00128).

II. Introduction to the Property and Application:

Applicants/Owners.. Art & Sylvia Krenzel
10505 NE 285th Street
Battle Ground, WA 98604

Representative ..... James Howsley
MILLER NASH, LLP
500 East Broadway, Suite 400
Vancouver, WA 98660-3324

Property ..... Legal Description: Parcel number 224514-000 (TL 15) located in the SE ¼ of Section 16, Township 4 North, Range 2 East of the Willamette Meridian.

Applicable Laws..... Clark County Code (CCC) Chapters 40.210 (R-5 Zoning District), 40.350 (Transportation), 40.560 (zone change), 40.570 (SEPA).

The 36.5-acre parcel in question is currently zoned R-10 (Residential, 10,000 sf minimum lot size) with a Rural comprehensive plan designation. The application seeks a zone change to R-5 (Residential, 5,000 sf minimum lot size). To merit zone change approval, CCC 40.560.020(H) requires that the applicant demonstrate, with substantial evidence, that all of the following approval criteria are met:

(1) The Requested zone change is consistent with the comprehensive plan map designation.

(2) The requested zone change is consistent with the plan policies and locational criteria and the purpose statement of the zoning district.

(3) The zone change either:

a. Responds to a substantial change in conditions applicable to the area within which the subject property lies;

b. Better implements applicable comprehensive plan policies than the current map designation; or
c. Corrects an obvious mapping error.

(4) There are adequate public facilities and services to serve the requested zone change.

The parcel is surrounded on three sides (north, east & south) by R-5 zoned property (Ex. 3), and the land west of the site is zoned R-20. The R-20 zoned properties and the R-5 zoned parcel immediately north are in large blocks; whereas, the R-5 zoned parcels east and south of this site appear to be divided into 5-acre parcels. This property was rezoned from Agri-Forest 20 to R-10 in 1997. The current owners owned the property at the time, and it appears that the zone change was a legislative action initiated by the County in connection with the elimination of the Agri-Forest 20 zone. Documents associated with that zone change, however, are not part of this record. An additional complicating factor is the presence of extensive Category 2 forested wetlands on this and some of the adjacent properties, especially the R-20-zoned property west of the site (Exs. 12 & 19).

The application includes a narrative (Ex. 7, tab 4) that articulates several theories that individually or collectively attempt to justify this zone change request. First, the parcel is surrounded on three sides by R-5 zoned parcels, indicating that R-5 zoning is most appropriate for this parcel. Second, the County should have, but failed to, rezone the parcel R-5 in 1997 when it eliminated the Agri-Forest 20 zone. Finally, the adoption of the Rural Cluster Development Ordinance in 1999 enables the wetland areas of this property to be preserved while maximizing the development of this rural lot. According to the applicant, the County's adoption of the Cluster Development Ordinance constitutes the "substantial change in conditions" that justifies zone change approval.

II. Summary of the local proceeding and Record:

A preapplication conference was requested June 16, 2004 and held July 8, 2004 (Ex. 6). A fully complete application was submitted August 5, 2004 (Ex. 7) and determined to be complete on August 25, 2004 (Ex. 8). Based on this sequence of events, this application has a vesting date of June 16, 2004.

Notice of the Type III application and a November 4, 2004 public hearing on the application was mailed to the applicant and to property owners within 500 feet of the property on August 31, 2004 (Exs. 9 & 10), and a notice was posted on the site and in the vicinity on October 20, 2004 (Ex. 15). Notice of the May 6, 2004 hearing date and the SEPA Determination of Nonsignificance (DNS) were published in the Columbian on October 15, 2004 (Exs. 13 & 14). The County received no appeals and only one comment on the SEPA Determination by the submission deadline of November 3, 2004. That one comment (Ex. 17) was from the Southwest Clean Air Agency and did not require a separate response. Staff issued a comprehensive report on the project dated October 20, 2004 (Ex. 16) recommending denial of the proposed rezone. According to staff, the County's adoption of the Rural Cluster Development Ordinance in 1999 was not a "substantial change in conditions," therefore the application failed to demonstrate compliance with the third zone change criterion.

At the commencement of the November 4, 2004 hearing, the Hearings Examiner explained the procedure and disclaimed any ex parte contacts, bias, or conflict of interest. No one objected to the proceeding, notice or procedure. No one raised any procedural objections or challenged the Examiner's ability to decide the matter impartially, or otherwise challenged the Examiner's jurisdiction.

At the hearing, Josh Warner, County planning staff on the project, provided a verbal summary of the proposal and the bases for his recommendation from the written staff report. The applicants, Art and Sylvia Krenzel, testified, as did their attorney James Howsley, in support of the application and in opposition to staff's negative recommendation. Mr. Howsley submitted a memorandum (Ex. 21) and requested the opportunity for further comment on the application, given his late involvement in the project. Roger Larson, who owns and lives just west of the subject site, testified in favor of the rezone application, stating that a smaller lot size is more efficient use of rural land because it maximizes building lots. Rick Homer, a local real estate agent, also testified in favor of the application saying that cluster development under R-5 zoning would preserve critical lands (wetlands) on the site. Mr. Homer testified as to a substantial demand for 5-acre rural homesites. At the end of the November 4th hearing, the Examiner ordered that the record be kept open according to the following schedule, which was consented to by the applicants:

November 12 (1 week).....Applicants' additional submission
November 26 (2 weeks).....Staff's review and response
December 3 (1 week).....Applicant's final rebuttal (no new evidence)

Mr. Howsley submitted an additional memo (Ex. 22) as did staff (Ex. 23). Mr. Howsley submitted final rebuttal on behalf of the applicants (Ex. 24), after which the record closed on December 3, 2004.

III. Findings:

Only issues and approval criteria raised in the course of the application, during the hearing or before the close of the record are discussed in this section. All approval criteria not raised by staff, the applicant or a party to the proceeding have been waived as contested issues, and no argument with regard to these issues can be raised in any subsequent appeal. The Examiner finds those criteria to be met, even though they are not specifically addressed in these findings. The following issues were either raised by the applicant or member of the public, addressed by staff in its report, or by agency comments on the application, and the Examiner adopts the following findings with regard to each:

This application and the Examiner's decision are governed by the zone change criteria in CCC 40.560.020(H). The applicant is required to demonstrate, with substantial evidence, that all four of these criteria are met. With regard to the first two and the fourth criteria, the Examiner adopts as his own the staff's analysis and conclusions set forth in the staff report (Ex. 16, pp 4-5 & 6), in other words, those three criteria are met. With regard to the third, criterion, *i.e.,* CCC 40.560.020(H)(3), the Examiner adopts the following finding:

The Third rezone criterion requires the applicant to demonstrate the existence of any one of the following:

a. The rezone responds to a substantial change in conditions applicable to the area within which the subject property lies;
b. The rezone better implements applicable comprehensive plan policies than the current map designation; or
c. The rezone corrects an obvious mapping error.

This criterion reflects the near ubiquitous "change or mistake" requirement for zone changes and the alternative requirement that the applicant demonstrate that the proposed zone better implements the applicable comprehensive plan provisions. There is no suggestion of a map error. The applicants articulate three credible arguments under the first two standards in their concluding memos (Exs. 22 & 24). The applicants acknowledge the lack of case law precedent to support the argument that a legislative enactment, such as the adoption of a cluster development ordinance, has ever been viewed as a sufficient "substantial change in conditions" in the rezone context. Citing *Tugwell v. Kittitas County*, 90 Wn.App. 1, 951 P2d 272 (1997), the most the applicants say is that an ordinance amendment "may provide the impetus for a rezone." However, this is not the standard. They also note the singular lack of policy guidance in the comprehensive plan that would favor one rural zone over another – a situation also noted by the Prosecuting Attorney (Ex. 5).

As a theoretical proposition, the Examiner agrees with the applicants' first argument (Ex. 22) that a legislative enactment could constitute a "substantial change in conditions applicable to the area within which the subject property lies" that militates in favor of a different zone for the subject property. However, the Examiner does not see the adoption of cluster development, with nothing more, to be a "substantial change" sufficient to justify this rezone under CCC 40.560.020(H)(3)(a). The Court in the *Tugwell* case, upon which the applicants rely, had more to work with by way of changed circumstances:

> Several factors are relevant to the question whether there has been a substantial change of circumstances, including changes in public opinion, in land use patterns, and in the property itself. … In support of their application, the Snowdens submitted a map demonstrating that their property was virtually surrounded by parcels of less than 20 acres. Many of these parcels are to the north and east of the Snowdens' property, and thus are conforming uses in the AG-3 zone. However, several small parcels, including two to the south of less than three acres, are nonconforming lots in the AG-20 zone. The Snowdens also submitted information obtained from the assessor's office indicating many of these small parcels had been created since their property was zoned in 1980. This information alone is evidence that since 1980 the area generally has been divided into small rural lots, notwithstanding the AG-20 zoning to the west and south of the Snowdens' property. … as the County's planning director pointed out, each of the lots is at least a potential building site. The creation of small parcels, not large enough to accommodate agricultural activities, certainly demonstrates a trend toward residential development. The Snowdens provided proof of a substantial change in circumstances since their property was zoned in 1980.

Tugwell v. Kittitas County, 90 Wn.App. at 11 (citations omitted).

The applicants here offer none of the parcelization, proliferation of buildable lots in the immediate rural area, or other trends that show changed circumstances. Instead, they point only to the County's adoption of the Rural Cluster Development Ordinance. According to *Tugwell* and subsequent cases, a change that might justify a rezone might include the up-zoning of adjacent properties that allows higher residential densities or more intensive urban-like uses and a commensurate parcelization of rural lots. If the neighboring properties were up-zoned, and there was nothing to distinguish the adjacent property from the subject property, that would militate in favor of also up-zoning the subject parcel. Such change in near-by zoning might also indicate a trend toward eventual urbanization or at least much smaller lot sizes. That is not the case here, however, since the Cluster Development Ordinance applies to all rural residential zones equally – R-10 as well as R-5 – and there is a significant on-the-ground difference between the subject site and the neighboring R-5 zoned properties, *viz*., the substantial wetlands on the Krenzels' property.[1]

It is true that the comprehensive plan places a high priority on zoning and development forms that protect wetlands and their buffers, and the cluster development ordinance facilitates that preservation objective. Contrary to the applicants' argument, though, it does not follow that, with the adoption of a cluster development ordinance, the County can declare wetlands saved and proceed to up-zone wetland parcels for more intensive development. To the extent that clustered developments on R-5 zoned lands (as the applicant proposes) will preserve a site's wetlands, cluster development in combination with R-10 zoning preserves wetlands to an even greater extent. The cluster development ordinance was designed to facilitate the preservation of critical areas and to preserve property owner's development rights under the base zoning. To use the adoption of cluster development as justification for up-zoning the base zone would undermine the preservation policy behind cluster developments. Consequently, the Examiner reject's the applicants' argument that this particular legislative action, *i.e.,* the adoption of the Rural Cluster Development Ordinance, with nothing more, constitutes a "substantial change in conditions" that justifies up-zoning this parcel from R-10 to R-5.

Similarly, the Examiner rejects the applicants' second argument (Ex. 22) that the County's allocation of 15,009 additional residents to the rural areas by 2023 justifies the up-zoning of this parcel. Had this been the Board of Commissioners' intention, the Board would have said so by explaining that rural residential development shall be maximized through the incremental up-zoning of rural parcels. The Board of Commissioners gave no such direction, and the Examiner is disinclined to interpret the rural population projections, with nothing more, as a green light for up-zoning the rural residential zones to allow parcelization and more dwelling units on smaller lots.

The applicants' third argument (Ex. 22) is more compelling, but not enough to justify this rezone. The applicants correctly state that the former comprehensive plan provides no particular guidance for assigning one rural residential zoning district over another. The Prosecuting Attorney correctly observes that "the plan fails to contain guidelines for application of R-5, R-10 or R-20 zoning designations. In the absence of

[1] Another legislative change that might constitute a significant change in circumstances sufficient to allow R-5 zoning, and which is absent from this case, would be a repeal of wetland and critical area preservation regulations.

such guidelines, staff and the hearings examiner will be at sea in how to deal with the proposal" (Ex. 5). The current Comprehensive Plan,[2] however, provides some policy guidance behind the various rural zoning districts and says the following about the R-10 zone in particular:

> This designation is intended to provide lands for residential living in the rural area. Natural resource activities such as farming and forestry are allowed and encouraged to occur as small scale activities in conjunction with the residential uses in the area. These areas are subject to normal and accepted forestry and farming practices. The Rural 5, 10 and 20 base zones implement this designation. A Rural 10 designation are applied within the rural area to prevent premature subdivision of future urban areas where the lands are adjacent to designated Urban Reserves, the predominant size are equal or greater than 10 acres, act as a buffer to Natural Resource lands, and protects environmentally critical areas consistent with applicable county ordinance and related regulations. This allows for efficient urban development when land is added to the urban growth areas. Rural 20 map designation applies to rural areas where the lands act as a buffer to Natural Resource designated lands, are used for small scale forest or farm production, and contain significant environmentally constrained areas as defined by applicable county code and related regulations.

Clark County Comprehensive Plan (2003-2023) page 1-15 (emphasis added).

Thus the Board envisioned two different purposes for the R-10 zone, only one of which applies here. As this policy indicates, R-10 zoning is sometimes used at the urban fringe as a holding zone to preserve large lots for future urban development and to prevent premature development patterns that might interfere with the urban zoning and development patterns. However, the holding pattern purpose of the R-10 zone only applies "where lands are adjacent to designated Urban Reserves." Because this property is approximately two miles from the nearest urban area, this rationale seems unlikely in this situation, and the applicants admit as much in their concluding memo (Ex. 24, p 4). The Examiner rejects the applicants' contradictory assertion that R-5 zoning is more appropriate because this land will eventually urbanize (Ex. 24, p 3). This property's remote location from the nearest urban area makes this prospect exceedingly unlikely.

The second stated purpose for R-10 zoning is more plausible, *viz*., the protection of wetland and other critical areas. Based on the record, the characteristics of the subject property and this policy, the Examiner concludes that the subject site was zoned R-10 in 1997 because of the site's wetlands. In that light, R-10 zoning, with or without cluster development will better preserve the site's wetlands and buffers than would R-5 zoning, with or without cluster development. The Examiner specifically rejects the applicants' statement that "a rezone of this particular parcel will ensure the greatest protection for the critical areas on an ongoing basis while not offending the surrounding lots" (Ex. 24, p 2). The parcelization of resource areas, inviting residential development,

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[2] Staff (Ex. 23) and the applicants (Ex. 24) all seem to agree that this rezone application vested after the adoption date for the current (revised) Clark County Comprehensive Plan, and is therefore subject to the current Comprehensive Plan and its policies.

does not protect critical areas, but serves to erode them and compromises the functions and values that the County seeks to protect.

In conclusion, it appears that R-10 zoning better implements the County's stated objective of preserving the site's critical wetlands than would R-5 zoning. That purpose is better served by R-10 zoning than R-5 zoning whether cluster development is employed or not. Therefore, the current zoning better implements the applicable comprehensive plan provisions, and the applicants' third argument fails. The Examiner finds that the third criterion is not met, and for that reason the rezone is denied.

IV. SEPA Determination:

Based on the application materials and agency comments, staff determined that there were no probable significant adverse environmental impacts associated with this proposal that could not be avoided or mitigated through the conditions of approval listed below. Accordingly, the County, as the lead agency, determined that an environmental impact statement was not needed. The County issued and published its Determination of Nonsignificance for this project on October 20, 2004 (Exs. 14 & 16). No timely comments or appeals were received by the comment and appeal deadline of November 3, 2004; therefore, the SEPA determination is final.

V. Decision:

Based on the foregoing findings, the Examiner denies this rezone request.

Date of Decision: December, ____, 2004.

By: _____
Daniel Kearns,
Land Use Hearings Examiner

NOTE: Only the Decision and Conditions of approval, if any, are binding on the applicant, owner or subsequent developer of the subject property as a result of this Order. Other parts of the final order are explanatory, illustrative or descriptive. There may be requirements of local, state or federal law or requirements which reflect the intent of the applicant, county staff, or the Hearings Examiner, but they are not binding on the applicant as a result of this final order unless included as a condition of approval.

Notice of Appeal Rights

An appeal of any aspect of the Hearings Examiner's decision, except the SEPA determination, may be appealed to the Board of County Commissioners only by a party of record. A party of record includes the applicant and those individuals who signed the sign-in sheet or presented oral testimony at the public hearing or submitted written testimony prior to or at the public hearing on this matter.

Any appeal of the final land use decisions shall be filed with the Board of County Commissioners, 1300 Franklin Street, Vancouver, Washington, 98668 within 14 calendar days from the date the notice of final land use decision is mailed to parties of record.

Any appeal of the Land Use Hearings Examiner's final land use decision shall be in writing and contain the following:

1. The case number designated by the County and the name of the applicant;

2. The name and signature of each person or group (petitioners) and a statement showing that each petitioner is entitled to file an appeal as described under Section 18.600.100A) of the Clark County Code. If multiple parties file a single petition for review, the petition shall designated one party as the contact representative with the Development Services Manager. All contact with the Development Services Manager regarding the petition, including notice, shall be with this contact person;

3. The specific aspect(s) of the decision and/or SEPA issue being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied on to prove the error;

4. If the petitioner wants to introduce new evidence in support of the appeal, the written appeal must also explain why such evidence should be considered, based on the criteria in subsection 18.600.100(D)(2); and

5. A check in the amount of $279 (made payable to the Clark County Board of County Commissioners) must accompany an appeal to the Board.